

No. 15289

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CASH DIVIDEND CHECK CORPORATION,

Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON, Doing Business
Under the Fictitious Firm Name and Style of CASH
SAVING CHECK CORPORATION and CASH SAVING CHECK
CORPORATION,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment and decree of the District Court for the Southern District of California, Central Division [R. 19]. The cause of action, as stated in the complaint [R. 3-8], is one for infringement of a statutory copyright secured by compliance with the provisions of Section 10, Title 17 USC. The appellant obtained registration of its claim to copyright pursuant to the provisions of Section 11 of Title 17 and a certificate of registration covering said claim was issued to appellant on February 15, 1934, and identified as Class AA 139152. The work for which said copyright was secured is exemplified by Exhibit 1 to the complaint; the registration thereon is exemplified by Exhibit 3 thereto. The District

Court decreed [R. 19] that the work exemplified by said Exhibit 1 was not a valid copyright under the provisions of Section 10, Title 17 of the United States Code and under the Copyright Laws of the United States and dismissed the complaint on its merits. The issue of the validity of the statutory copyright and the registration secured thereon is raised by the notice of appeal [R. 20].

Jurisdiction.

Jurisdiction to review the judgment and decree of the District Court is conferred by Section 1291 of Title 28 USC inasmuch as the judgment and decree of the District Court was final. Said judgment and decree was entered on August 6, 1956 [R. 19-20]. The notice of appeal was given and filed on August 7, 1956 [R. 20]. The appeal was, therefore, taken within the thirty day period provided for in rule 73 of the Federal Rules of Civil Procedure (Title 28 USC Rule 73(a)).

Jurisdiction over the subject matter was conferred upon the Court below by Section 1338(a) of Title 28 USC. Jurisdiction over the appellees was obtained by the provisions of Section 1400(a) of Title 28 USC, the appellees being residents of the Southern District of California, Central Division.

Statement of the Case.

The action was filed by Cash Dividend Check Corporation, a Colorado corporation, against Leonard F. Davis and Wayne Layton, doing business under the fictitious firm name and style of Cash Saving Check Corporation. At the trial of the action the Court ordered that Cash Saving Check Corporation, a California corporation, be

made a party defendant [R. 44]. The complaint alleged [R. 5] that the defendants Leonard F. Davis and Wayne Layton caused to be published and placed upon the market a book entitled "Cash Saving Check", copied largely from plaintiff's book "Cash Dividend Check Pay to the Order of." The work of the plaintiff and appellant and alleged to be covered by a statutory copyright is exemplified by Exhibit 1 to the complaint. The alleged infringing work is exemplified by Exhibit 2 thereto. The answer [R. 13], for lack of sufficient information to form a belief, denies the allegations of infringement of the statutory copyright and the securing of the same by complying with the provisions of Sections 10 and 11 of Title 17 USC. The answer [R. 14] admitted the publication of the alleged infringement, Exhibit 2 to the complaint. No affirmative defenses were pleaded in the answer going to either the issue of validity or infringement of the statutory copyright. The issues raised by the complaint and answer are the validity of the statutory copyright and the infringement thereof by the published works of the appellees. The sole issue determined by the District Court was that of validity of the statutory copyright as claimed by the certificate of registration issued by the Register of Copyrights.

The Findings of Fact and Conclusions of Law [R. 15-18] were directed solely to the question of validity. No findings or conclusions were made upon the issue of infringement. The Court refused to make any such findings, stating that its finding of invalidity of the statutory copyright obviated the necessity of findings on infringement.

The notice of appeal [R. 20] brings before this Court the issue of whether the Court below was correct in de-

creeing in the judgment [R. 19] that the work exemplified by Exhibit 1 to the complaint was not such a work as could be covered by a statutory copyright pursuant to the provisions of Section 10, Title 17 USC. There was no issue before the Court as to the appellant failing to comply with the provisions of said Section 10 as to proper notice and publication of the work.

The Copyright in Suit.

Anyone who is entitled to secure a copyright pursuant to the provisions of Title 17 USC may do so by complying with the provisions of Section 10 of said Title. An action for infringement of said copyright may be brought if the claimant has, pursuant to the provisions of Section 11 thereof, obtained registration of the claimed copyright by complying with the provisions of said Title, it being provided upon such compliance the Register of Copyrights shall issue the certificate which is provided for in Section 209 of said Title.

Counsel for the appellees stipulated that an application for certificate of registration was made and a certificate was issued by the Copyright Office, as alleged in the complaint [R. 29]. This certificate exemplified by Exhibit 3 to said complaint. Pursuant to the provisions of Section 209 of Title 17, the certificate is *prima facie* evidence of the facts stated therein. These facts are, as shown by Exhibit 3, that copies of the work entitled "Cash Dividend Check Pay to the Order of" were received on February 15, 1934 by the Register of Copyrights and that the affidavit in connection therewith was received on the same date. The certificate further shows that the date of publication of the work covered by said certificate was on

February 10, 1934. No evidence was introduced by appellees which in any manner refuted said facts.

Pursuant to the provisions of Section 5 of Title 17, the application for registration must specify which of the classes listed therein is covered by the work for which copyright is claimed. The certificate of registration exemplified by Exhibit 3 to the complaint shows that the entry of classification was made in Class AA and with the registration number being 139152. This classification under Section 5 is for Books, including composite and cyclopedic works, directories, gazetteers, and other compilations. There is no evidence in the record or before the Trial Court that the classification of the work as a Book in Class A was in error or that the Register of Copyrights in any manner failed to perform his administrative functions.

There is no issue as to the fact that the work exemplified by Exhibit 1 to the complaint is the work covered by said certificate of registration as exemplified by Exhibit 3 thereto. Said work is for use in a method of doing business whereby saving stamps supplied by appellant or its licensees are issued by merchants to purchasers of goods and affixed to the work exemplified by Exhibit 1 in the spaces provided for. As soon as the number of stamps specified on said work are affixed, the work can then be presented to the bank which is designated thereon and the holder can receive cash to the extent of the value of the stamps. As a part of the method of doing business, the appellant has contractual relations with the bank and a sum of money available on deposit therein for the redemption of the works presented.

Although saving stamps are old in the art, this method of doing business was unique and original and resulted in a different use for savings stamps than had theretofore been made. No claim was made before the Trial Court nor is being made on appeal that the appellant has any monopoly as to said plan or scheme of doing business. The work covered by the statutory copyright is one of the steps in said method of doing business and as a specific step is entitled under the Copyright Laws of the United States to copyright protection.

It is the position of appellant that the work exemplified by Exhibit 1 to the complaint [R. 9] is a Book under the classification set forth in Section 5 of Title 17 USC and that the appellant has complied with the provisions of Sections 10 and 11 of said Title and has secured a statutory copyright upon said work and a registration of copyright for the same. The fact that there can be no monopoly under either the copyright or patent laws of the United States covering a method of doing business does not prevent the appellant from securing a valid statutory copyright upon a work which is one of the steps employed in performing said method.

Findings and Conclusions of the Trial Court.

Findings of fact and conclusions of law were approved by the Trial Court and filed on August 6, 1956 [R. 15-19]. The judgment appealed from, in accordance with the rules of the District Court for the Southern District of California, was a part thereof and was entered at the same time [R. 19-20].

Finding of Fact V [R. 17] states that the work exemplified by plaintiff's Exhibit 1 to the complaint is not

subject matter which can be covered by a statutory copyright pursuant to the provisions of Section 10, Title 17 USC. Conclusion of Law I [R. 18] is that plaintiff's original writing or work entitled "Cash Dividend Check Pay to the Order of" is not copyrightable subject matter under the Copyright Laws of the United States and Conclusions of Law II is that the complaint must be dismissed.

In Findings IV and VI [R. 16-17] the Court found the appellant had complied with the provisions of Title 17 USC in endeavoring to secure a copyright covering the work exemplified by plaintiff's Exhibit 1 to the complaint. The action was, therefore, dismissed solely upon the finding by the Court that the work which was the subject matter of the certificate of registration, plaintiff's Exhibit 3 to the complaint, was not subject matter which could be covered as a copyright under the Copyright Laws of the United States.

There was no mention in the findings, conclusions or judgment of any of the issues of infringement raised by the complaint and answer. Although the Court specifically refused to make such findings, nevertheless the Court indicated what such findings would be if included by stating [R. 66] that there was no question in his mind that the appellees had copied the work which was the subject matter of the certificate of copyright registration.

Questions On Appeal.

The questions presented by the appeal are:

1. Whether the work exemplified by Exhibit 1 to the complaint is copyrightable subject matter which can be protected under the provisions of Title 17 USC and par-

ticularly Section 10 thereof. Raised by points 1, 2 and 5 of appellant's concise statement of points under rule 17(6) [R. 68, 69] and by appeal from the judgment [R. 19].

2. Whether the work exemplified by plaintiff's Exhibit 2 to the complaint and defendants' Exhibit A [R. 57] embodies subject matter which is an infringement of the statutory copyright of appellant. Raised by points 3, 4 and 6 of appellant's concise statement of points under rule 17(6) [R. 69].

3. Whether the Trial Court erred in Finding of Fact IX [R. 18] that the action of appellees in publishing works as exemplified by Exhibit 2 to the complaint did not cause any damage or injury to the appellant. Raised by point 7 of appellant's concise statement of points under rule 17(6) [R. 69].

Specifications of Errors Relied Upon.

Appellant in its concise statement of points under rule 17(6) [R. 68, 69] has set forth the errors which it urges were committed by the Trial Court. Appellant relies on said errors as consolidated and restated herein in furtherance of the argument of the appeal as hereinafter presented:

1. The District Court erred in holding that the work exemplified by plaintiff's Exhibit 1 to the complaint was not copyrightable subject matter under the Copyright Laws of the United States (Finding V [R. 17], Conclusion I [R. 18], Judgment Par. 1 [R. 19]) because:

(a) Said work is a book as classified under Section 5 of Title 17 and contains original subject matter of the author.

(b) The provisions of Title 17 USC were complied with by appellant in securing the statutory copyright provided for in Section 10 thereof and securing the certificate of registration from the Register of Copyrights provided for in Section 11 thereof.

2. The District Court erred in failing to find and conclude that the work published by the appellees and exemplified by plaintiff's Exhibit 2 to the complaint and plaintiff's Exhibit 2 [R. 53] was an infringement of appellant's statutory copyright because:

(a) Said work of appellees was largely copied from appellant's statutory copyright as exemplified by plaintiff's Exhibit 1 to the complaint and contained subject matter which was original with appellant. The Trial Court, although admitting [R. 66] that the appellees copied the statutory copyright of appellant, nevertheless failed to make any finding or to enter any conclusion covering the issue of infringement.

Summary of Argument.

1. The work covered by appellant's statutory copyright is an original work properly classified as a book by the Register of Copyrights pursuant to the provisions of Section 5, Title 17, United States Code.

2. Having complied with the provisions of Sections 10 and 11 of said Title 17, the appellant is entitled to a copyright covering said original subject matter and to the protection accorded such copyright by the provisions of Title 17. The certificate of copyright registration issued by the Register of Copyrights was issued by said Register in performing his administrative functions under the Copyright Laws of the United States and the rules

of the Copyright Office and secures the claim to statutory copyright provided for by Section 10 of Title 17. The fact that the work covered by the statutory copyright is used as a step in a method of doing business does not prevent the original subject matter therein from being given protection by copyright under the provisions of Title 17.

3. Subdivision (a) of Section 5 of Title 17 USC is a catch-all section which is used by the Copyright Office to classify works which do not clearly fall under the other subdivisions of said section. Section 5 in fact specifically provides that other compilations shall be included in Section (a) and also provides at the end of said section that any error in classification shall not invalidate or impair the copyright protection secured by Title 17 and that the classification of works for registration as provided for in Section 5 shall not be held to limit the subject matter of copyright as defined in Section 4 of Title 17, said Section 4 providing that the works for which a copyright may be secured shall include all the writings of an author.

4. Having complied with the provisions of Title 17, the test of whether a work comprises copyrightable subject matter is whether it contains original writings of an author.

5. The publication of appellees, plaintiff's Exhibit 2 to the complaint, is an infringement of appellant's copyrighted work and this Court should determine the issue of infringement.

ARGUMENT.

Originality.

A copyright may be registered for a work of an author which is original, that is which owes its origin to the author, and such copyright is valid regardless of whether the subject matter of the copyright is novel. *Stein v. Mazer*, 204 F. 2d 472, affirmed 98 L. Ed. 630, 347 U. S. 201.

The originality which must reside in a work in order to secure the protection of statutory copyright must be original in that the author has created it by his own skill, labor and judgment. *Dorsey v. Old Surety Life Ins. Co.*, 98 F. 2d 872, C. C. A. Okla.

In a relatively recent decision the United States District Court for the Eastern District of Michigan, in *Gordon v. Weir et al.*, 111 F. Supp. 117, in determining whether an advertisement was the proper subject of copyright, held, p. 122, that such an advertisement which exhibited some original intellectual effort as to conception, composition and arrangement was copyrightable under the Copyright Statutes of the United States. In affirming this case on appeal, 216 F. 2d 508, the Court of Appeals for the Sixth Circuit held the copyright to be valid, stating that the District Court has correctly applied the law.

This Court in *Leon v. Pacific Telephone & Telegraph Co.*, 91 F. 2d 484 held a copyright on a telephone directory to be valid in that it contained original subject matter even though such originality consisted only in listing the names and telephone numbers of subscribers.

Similarly an alphabetical list of names and addresses of jewelers classified under different heads was held to be a valid copyright under Classification A of Section 5 of Title 17. *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 Fed. 83.

In *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. 2d 35, the Court held that a combination and collection of matter forming a composite work from which a banker could ascertain at a glance practically all information pertaining to time on commercial paper was either a compilation or a book under the provisions of the Copyright Laws and was a valid copyright.

In *Gordon v. Weir*, *supra*, the subject matter sought to be protected by copyright consisted of an advertisement of a dot counting contest which portrayed merchandise given as a prize in a picture made up of a large number of dots, offering to the reader a main prize or prizes consisting of merchandise and a secondary prize consisting of credit checks applicable to the purchase price of the prize merchandise. This work was held to be a valid copyright under Class A-5 of Title 17 and to be infringed by the defendant.

The certificate of registration exemplified by plaintiff's Exhibit 3 to the complaint is *prima facie* evidence pursuant to the provisions of Section 209 of Title 17 as to the facts stated therein. Such facts are, as shown on said certificate, that the author was W. V. Mathews, that the copyright owner was the appellant herein, and that the work was published February 10, 1934. The appellees did not plead or prove the prior publication of any similar work. No attempt was made at the trial of the case to

prove that the work did not cover original subject matter of the author, other than the general contention that such a work was not subject to the Copyright Laws of the United States.

In *Remick Music Corporation v. Interstate Hotel Co. of Nebraska*, 58 F. Supp. 523, affirmed 157 F. 2d 744, certiorari denied 91 L. Ed. 691, rehearing denied 91 L. Ed. 1296, where the defendants in an action for infringement of copyrights conceded the alleged authorship of the compositions in controversy and certificates of copyright registration were introduced in evidence and the defendants introduced no evidence on the subject of originality, the Court held that a *prima facie* case of originality and a valid copyright was made out. The holding in this case, which the Supreme Court of the United States did not deem worthy of review, is sufficient authority in and of itself to warrant this Court in reversing the judgment below.

The record, however, in this appeal shows affirmative testimony upon the question of originality and uniqueness. Mr. Bert Gordon of Denver, Colorado, President of the appellant, testified at the trial of the cause and his testimony is included in the record on appeal. Mr. Gordon is also President of Gordon Stores Co., Inc., a chain of department stores in Colorado, Texas and New Mexico [R. 25]. Gordon Stores Co., Inc. used the work covered by the copyright registration in its business because it was unique and original to them even though they had previously tried out various stamp plans of other concerns [R. 25]. Gordon Stores increased their volume of business forty percent within the first six months of usage of this work [R. 26].

The success of the use of the work in their stores caused Gordon Stores Co., Inc. to purchase the control of the plaintiff corporation in 1952 and to exploit the copyright thereafter [R. 26]. This exploitation was done by licensing distributors in various regions to use the copyright, including the licensed distributor in Southern California known as Check System Incorporated [R. 27]. This licensee is operating within the territory where the appellees are distributing and publishing the charged infringement. No attempt was made to dispute the testimony of Mr. Gordon either upon the question of the uniqueness or originality of appellant's copyrighted work or of the commercial success which flowed from the use of the same. If there were any such works in existence prior to the publication of appellant's work which were used in connection with saving stamps or any method of business using saving stamps, such evidence would undoubtedly have been presented to the Trial Court. The fact that the appellees have failed in any manner to attack the copyrighted work on the question of originality strengthens the position of the appellant on appeal that the Trial Court erred in finding that appellant's work did not contain copyrightable subject matter. Upon the evidence and the record before this Court such a finding could only be made upon the basis that the work *per se* contained no originality and was not copyrightable subject matter.

It is not contended by the appellant that the intellectuality necessary to compose appellant's work approached the intellectuality which would be necessary to compose and write a book upon a deep and abstruse scientific subject. However, the degree of intellectuality is not the test of originality, no more than the degree of an invention made

and covered by a patent is the test of whether an invention exists. If there is invention, a patent is valid regardless of the scope of the claims. If there is originality, a copyright is valid regardless of the degree of intellectuality necessary to compose the work covered by the copyright.

The Trial Court failed to apply the proper test in determining the question of validity of the copyright in issue. This Court in *Leon v. Pacific Telephone & Telegraph Co.*, *supra*, had no difficulty in holding the copyright therein valid and infringed and considering the same on its own merits as to originality regardless of whether it was used in the method of doing business which was carried on by the copyright owner, that is the business of conducting a telephone service. The Trial Court apparently confused the fact that a plan or scheme of doing business could not be protected with the fact that a work which was part of said scheme or plan could still be the subject of a valid copyright.

Reference to plaintiff's Exhibit 1 to the complaint will clearly show that it is not merely a check but that it is a work which contains unique and original subject matter and which is useful and was being used in connection with a stamp saving plan which, upon the record before the Court, was also unique and useful and has achieved commercial success even though in competition with other and numerous stamp saving plans.

It is submitted upon the question of validity that this Court should reverse the judgment of the Trial Court and should direct the Trial Court to enter a judgment determining that appellants' work as exemplified by Plaintiff's Exhibit 1 to the complaint contains copyrightable subject

matter and is a valid statutory copyright under the Copyright Laws of the United States. In so doing, this Court would be in accordance with the facts established by the record before the Court and the law cited herein pertaining to copyrights, including the decisions of this Court.

Infringement.

Although there is no finding or conclusion upon the issue of infringement, this Court has before it the alleged infringing publication of appellees as exemplified by Plaintiff's Exhibit 2 to the complaint [R. 10] and Plaintiff's Exhibit 2 [R. 53]. This Court is in as good or better position than the Trial Court to examine and determine the question of infringement. Under the authority of *Ry-Lock Company Ltd. v. Sears, Roebuck & Co.*, 227 F. 2d 615 (9 Cir.), this issue should be determined by this Court in the event that the judgment of the Trial Court is reversed upon the question of copyright validity without the necessity of sending the case back to the District Court for a determination of the issue of infringement. This particularly so in view of the statement of the Trial Court [R. 66] that there was no question in the Court's mind that the appellees had copied appellant's work for which a certificate of registration was issued by the Register of Copyrights.

The appellee, Leonard F. Davis, admitted [R. 48-49] that he had seen the work of the appellant prior to engaging in the alleged infringing activities and also had it available. He testified [R. 49-50]:

“Q. So that you had this check of the plaintiff corporation available at the time that you made up your check, is that correct? A. That’s right.

Q. As a matter of fact, you *practically* copied it, didn’t you? A. Well, yes, it is about the same. We didn’t try to copy it word for word. We used their idea.”

Having had access to the copyrighted work of the appellant and having practically copied it, as admitted, no attempt was made by the appellees to explain the similarities in the work exemplified by plaintiff’s Exhibit 1 to the complaint [R. 9] and the appellees’ alleged infringement plaintiff’s Exhibit 2 to the complaint [R. 10].

The test of infringement of copyright as laid down by this Court in *Harold Lloyd Corporation v. Witwer*, 65 F. 2d 1, at 18, is whether the copy comes so near to the original as to give every person seeing it the idea created by the original, citing *King Features Syndicate v. Fleischer*, 299 Fed. 533-535, and 13 *Corpus Juris* 1113, Section 276, note 30.

In referring to the *King Features Syndicate* case this Court quoted therefrom at page 19, the quotation in part reading:

“A copy is that which ordinary observation would cause to be recognized as having been taken from or the reproduction of another.”

The District Court in *Gordon v. Weir*, *supra*, cited this holding of the Court of Appeals for the Ninth Circuit at 111 Fed. Supp. 122 in rendering its decision that the

alleged infringement in said action was an infringement of the statutory copyright before the Court.

The similarities in appellant's copyrighted work and appellees' alleged infringement are such as to cause an ordinary observer to get the same idea from viewing it as said observer would have obtained by viewing the original and we are confident that this Court will get the same reaction from viewing the two works. Such reaction can only come from the fact that there are such similarities in the two works that the reaction is inevitable.

Appellant submits that the presence before this Court of the copyrighted work and the alleged infringing work of appellees, together with the fact that the appellees have admitted access to and copying of appellant's copyrighted work, that the appellees have made no explanation for the similarities in the two works and have used the same in their business for advertising purposes, fully justifies this Court in determining the issue of infringement on the record and holding that the appellees' alleged infringing work is an infringement of the valid copyright of appellant.

Conclusion.

Appellant submits that under the law cited herein and upon the record before this Court the judgment of the District Court holding that plaintiff's Exhibit 1 to the complaint did not contain copyrightable subject matter should be reversed and the Court below ordered to enter judgment that said statutory copyright is a valid copyright under the Copyright Laws of the United States.

Appellant further submits that this Court should, having the record before it, determine the issue of infringement and hold that the alleged infringing work of appellees, exemplified by plaintiff's Exhibit 2 to the complaint, is an infringement of the statutory copyright of appellant and direct the District Court to enter a judgment in accordance with said holding.

Respectfully submitted,

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